

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 25

AVI FOODSYSTEMS, INC.	)	
	)	
Employer	)	
	)	
and	)	Case 25-RC-259612
	)	
	)	
TEAMSTERS LOCAL UNION NO. 135	)	
	)	
Petitioner	)	

BRIEF IN SUPPORT OF EMPLOYER AVI FOODSYSTEMS, INC.'S. EXCEPTIONS  
TO REPORT ON OBJECTIONS, JD-41-20

I. Introduction

Comes now AVI Foodsystems, Inc. ("Employer" or "AVI") and in support of its  
Exceptions submits this brief.

II. Exception to Report on Objection 1.

(a) The ALJ, in his Report on Objection 1. cited the cross-examination testimony of Office Supervisor Molly Clark, ignoring her direct examination, and found that her testimony did not establish that the Notice of Petition for Election was posted on the bulletin board in the Warehouse prior to June 12, 2020. Report, P. 3, l. 12-31. The ALJ's finding is incorrect as shown by the entirety of Ms. Clark's relevant testimony:

Q. By Mr. Shoup: Have you been employed regularly between April 24<sup>th</sup> of 2020 and today?

A. Yes.

Q. And would you have worked today?

A. Yes.

Q. I am going to show you what has been submitted as Company Exhibit No. 2, and I refer you to what you will see in there as Notice of Petition for Election.

A. Yes.

Q. Do you see that?

A. Uh-huh.

Q. Do you recognize that document?

A. Yes, I do.

Q. Where have you seen that before?

A. It is posted in - - - right across from the bathrooms in the office, next to the supply closet, also in the Safety Board in the Warehouse.

Q. So it is posted in two - - in two places; is that correct?

A. Correct.

Q. And did you look today?

A. Yes, I did.

Q. And was it posted before you came here?

A. Yes, it was.

Q. And has it been posted throughout—how long has it been posted?

A. Since the end of April.

Q. By Mr. Vlink: Ms. Clark, when was the first time that you actually looked to see whether that Notice was posted on those - -

A. It was probably around the time it was first posted, at the end of April.

Q. At the end of April, you checked to see whether it was there?

A. Yes, because we were informed that it was posted.

Q. Okay. Where did - - which bulletin board did you look at?

A. That would be the one in the office. It is the one I see every day. It is right next to the restrooms.

Q. The one in the Warehouse, you don't see—you don't see that at all.

A. I don't see it as often, no. But it is right there where the Drivers sit and do their paperwork. Tr. p. 109-111.

Ms. Clark's testimony, which the ALJ found credible, clearly establishes the Notice of Petition for Election was posted on bulletin boards in the Warehouse as well as the office from late April through the date of the hearing on objections on September 23, 2020.

The ALJ stated unit employee Chris Kaufman tendered uncontradicted testimony that due to COVID-19 drivers and Warehouse employees were not allowed to enter the office area. Based on the ALJ's characterization that the testimony was uncontradicted, the testimony was credited. Report, p.2, L. 44-46. The ALJ's finding is incorrect. Seymour Branch Manager Tom DePriest testified that access to the office area was not restricted. Drivers and Warehouse workers had access to the office area and have used the restroom located there. Tr. p 72, l. 4-18.

As a result of chaotic business conditions as a direct result of COVID-19, the Notice of Petition for Election was not posted on April 29, 2020. Rather, it was posted on the Warehouse and office bulletin boards shortly after noon on April 30, 2020. Tr. p. 83-84; Tr. p. 87; Tr. p. 90; Company Exhibit 4 (Hearing Transcript).

(b) Rule 102.63 (a) (2) provides in pertinent part:

Within 2 business days after service of the Notice of Hearing, the Employer shall

post the Notice of Petition for Election in conspicuous places where notices to Employees are customarily posted and shall also distribute it electronically if the employer customarily communicates with its employees electronically...The employer's failure to post the Notice of Petition for Election may be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of Section 102.69 (a)...

The ALJ's citing of Section 103.20 of the Board's rules regarding the posting of the Notice of Petition for Election is clearly incorrect since it does not deal with the posting of notices. Likewise, the ALJ's assertion that a failure to strictly comply with the posting requirements regarding a Notice of Petition for Election requires an election to be set aside if timely objections are filed is also incorrect. Report, p. 8, l. 11-15.

Rather, Rule 102.63 (a) (2) gives the Board the discretion to evaluate the circumstances surrounding a posting problem and decide, based on the circumstances, whether the posting violation deprived employees of notice of the election.

AVI submits that the Notice of Petition for Election was conspicuously posted on bulletin boards at its Seymour Branch in the Warehouse and office. It was also emailed to unit employees, even though AVI did not regularly communicate with employees electronically. Because many were furloughed due to COVID-19, AVI wanted to make certain everyone was aware of the filing of the Petition.

As previously stated in (a) above, due to the business chaos created by COVID-19, the Notice of Petition for Election was posted shortly after noon on April 30, 2020 instead of April 29, 2020.

AVI urges the Regional Director, pursuant to Rule 102.63 (a) (2), to exercise her

discretion to forgive the approximately thirteen hour delay in posting the Notice and find that the Notice of Petition for Election was properly posted at its Seymour Branch, and by doing so, reject the ALJ's recommendation that Objection 1 should be sustained and the election set aside.

### III. Exception to Report on Objective 4.

Warehouse supervisor Jeff Carpenter, prior to being employed by AVI, worked in management at another warehouse where the workers were represented by the Teamsters. At that warehouse, only Teamsters-represented employees were allowed to operate forklifts. At AVI, only Mr. Carpenter and the assistant warehouse supervisor operated forklifts in the warehouse. After acknowledging that Warehouse supervisor Jeff Carpenter had good reason to be concerned about getting trucks unloaded if the Union won the election based on his experience in his previous employment, the ALJ found that Mr. Carpenter interfered with the AVI warehouse workers' freedom of choice in the election when he asked them if they wanted to learn how to operate a forklift.

When Mr. Carpenter asked each of the four employees if they were interested in learning, only one said, yes. The one, Jacob Mendez, was then invited to come to work the following Saturday at 3:30 a.m. and observe Mr. Carpenter operate the forklift to unload a truck. Mr. Carpenter testified that Mr. Mendez responded, "'3:30!'" and I said, 'Well, don't worry about it.' I said, 'Well maybe things will change,' because the pandemic had things all jacked up, and the change of delivery times change constantly." Tr. p. 144

Put in context, with Mr. Carpenter looking to possible future needs for trained employee fork lift drivers, and considering that the only mention of coming in at 3:30 was made to Mr. Mendez, who wanted to learn, because that was the time Mr. Carpenter was scheduled to unload a truck with a forklift the following Saturday, it is inconceivable that the conversation could be

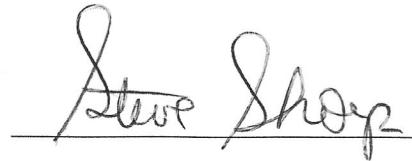
objectively deemed to interfere with an employee's free choice in the election. Furthermore, the fact that Mr. Carpenter did not compel Mr. Mendez to come in on Saturday to observe emphasizes that Mr. Carpenter was simply offering him an opportunity to enhance his skill level by learning how to operate a forklift, not interfering with his election choice.

For the ALJ to acknowledge Mr. Carpenter's legitimate concerns based on his prior experience in a unionized warehouse and then discredit his testimony is illogical.

AVI urges the Regional Director to reject the ALJ's recommendation that Objection 4 be sustained and the election set aside.

Dated: October 21, 2020

Respectfully submitted,

A handwritten signature in cursive script, reading "Steve Shoup", written over a horizontal line.

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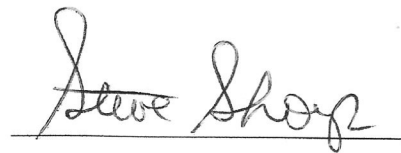
CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 21, 2020, this Brief In Support of Employer AVI Foodsystems, Inc's. Exceptions To Report On Objections, JD-41-20 was electronically filed through the Board's website where it is available for viewing and downloading and has been sent via email to the following:

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Steve Shoup